

**CBM Construction Sdn Bhd v Builtcon and
Development Sdn Bhd & Anor**

HIGH COURT (KUCHING) — CIVIL SUIT NO 22-184 OF 1998-I
IAN CHIN J
16 MARCH 1999

Civil Procedure — Injunction — Ex parte injunction — Application to set aside — Plaintiff did not come to court with clean hands — Fraudulent conduct of plaintiff — Whether injunction should be set aside

Civil Procedure — Stay of action — Forum non conveniens — Contract entered into and performed by parties who were residents of Negara Brunei Darussalam — Witnesses from that country — Whether action would be more conveniently tried in Negara Brunei Darussalam

The plaintiff and the first defendant were companies incorporated in Negara Brunei Darussalam. The second defendant was the managing director of the first defendant. The statement of claim asserted that the plaintiff and the first defendant entered into a contract in Negara Brunei Darussalam for the construction by the plaintiff of 25 houses for a consideration of B\$3,986,211. It was alleged that the second defendant had fraudulently and illegally dissipated or siphoned out B\$729,000 belonging to the first defendant. A Mareva injunction, though not in the full terms that were prayed for, was obtained against the second defendant. The second defendant applied to set aside the writ or to stay the action and to set aside the ex parte injunction on grounds that the action would be more conveniently tried in Negara Brunei Darussalam and that the plaintiff had no cause of action against the second defendant.

Held, granting the application:

- (1) It was the fraudulent conduct of the plaintiff which caused the first defendant to pay more than what it was originally required and the plaintiff facilitated that machination by allowing the sum to be paid to the second defendant which otherwise would have been paid to the first defendant (see p 370I-371A). Injunction being an equitable relief, the plaintiff must come to court with clean hands; they did not do so (see p 371D).
- (2) The court has the jurisdiction to try the case notwithstanding that the contract was made and performed in Negara Brunei Darussalam. However, the court should stay the action because the action would be more conveniently tried in Negara Brunei Darussalam, relying on the doctrine of forum non conveniens (see p 373A-B).

[Bahasa Malaysia summary]

Plaintif dan defendan pertama adalah syarikat-syarikat yang ditubuhkan di Negara Brunei Darussalam. Defendan kedua adalah

- A** pengarah urusan defendan pertama. Di dalam pernyataan tuntutan adalah dinyatakan bahawa plaintif dan defendan pertama telah memasuki satu kontrak di Negara Brunei Darussalam untuk plaintif membina 25 buah rumah bagi balasan sebanyak B\$3,986,211. Adalah didakwa bahawa defendan kedua telah, dengan penipuan dan secara haram, melesapkan atau menyalurkan keluar B\$729,000 kepunyaan defendan pertama. Satu injuksi Mareva, walaupun tidak di dalam terma-terma sepenuhnya, telah diperolehi terhadap defendan kedua. Defendan kedua memohon untuk membatalkan writ tersebut atau menggantung tindakan tersebut dan membatalkan injuksi ex parte tersebut atas alasan bahawa tindakan tersebut akan lebih mudah dibicarakan di Negara Brunei Darussalam dan bahawa plaintif tiada kausa bagi tindakan terhadap defendan kedua.

Diputuskan, membenarkan permohonan:

- D** (1) Adalah tindakan penipuan plaintif yang menyebabkan defendan pertama terpaksa membayar lebih daripada sepatutnya dan plaintif telah memudahkan proses tersebut dengan membenarkan wang dibayar kepada defendan kedua yang mana sepatutnya dibayar kepada defendan pertama (lihat ms 370I–371A). Injunksi adalah satu relif ekuiti, plaintif hendaklah datang ke mahkamah dengan tangan yang bersih; mereka tidak berbuat demikian (lihat ms 371D).
- E** (2) Mahkamah mempunyai bidang kuasa untuk membicarakan kes tersebut tidak kira walaupun kontrak tersebut telah dibuat dan dilaksanakan di Negara Brunei Darussalam. Bagaimanapun, mahkamah harus menggantung tindakan tersebut kerana tindakan tersebut akan lebih mudah jika dibicarakan di Negara Brunei Darussalam, berdasarkan doktrin forum non conveniens (lihat ms 373A–B).]
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Notes

- G** For cases on an application to set aside an ex parte injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1958–1967. For a case on stay of action, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4251.

H Cases referred to

- American Express Bank Ltd v Mohamod Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 (refd)
- Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 (refd)
- I** *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (refd)
- Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)

Reciprocal Enforcement of Judgments Act 1958 First Schedule

William Chang (Shankar Asnani with him) (Shankar Ram & Co Advocates) for the plaintiff.

David Lim (Wan Ullok, Jugah, Chin & Co Advocates) for the defendants.

Ian Chin J:*Introduction*

This is an application by Builtcon and Development Sdn Bhd ('the first defendant') and Lee Hon Khiong ('the second defendant') to set aside the writ or to stay the action and to set aside the ex parte injunction that was obtained against the second defendant on 25 August 1998 by CBM Construction Sdn Bhd ('the plaintiff'). The plaintiff and the first defendant are both companies incorporated in Negara Brunei Darussalam. The second defendant is the managing director and shareholder of the first defendant.

The allegations

The statement of claim asserted that the plaintiff and the first defendant entered into a contract in Negara Brunei Darussalam on 5 November 1996 for the construction by the plaintiff for the first defendant of 25 houses for a consideration of B\$3,986,211 and that a sum of B\$1,320,746.84 is alleged to be still due. As against the second defendant, the plaintiff asserted that he, after lifting the corporate veil, should be liable because he was the alter ego of the first defendant and had fraudulently and illegally dissipated or siphoned out B\$729,000 belonging to the first defendant for his personal use through the assistance of Chieng Bong Ming, the managing director of the plaintiff. This was achieved by the plaintiff, at the request of the second defendant, submitting another but higher tender for the construction of the said houses for the sum of B\$3,986,211 after it had earlier submitted a lower tender of B\$3,257,211. The difference between the two sums, that is RM729,000, was paid to the second defendant by two instalments in September and November 1997. More of the allegations will be adverted to when the issues are considered.

Ex parte injunction

On 25 August 1998 I granted a Mareva injunction but not in the full terms that were prayed for. I did not allow the prayer that the banks disclose to the plaintiff's advocates the details of the second defendant's accounts so as to limit the damage that may be done by an ex parte order on a party affected by it as I entertained some doubts regarding the conduct of the plaintiff, acting through its managing director Chieng Bong Ming. Assuming for the moment the allegations of the plaintiff are true, it is without question a fraudulent conduct on the part of the plaintiff acting through Chieng Bong

- A** Ming to cause the first defendant to pay more than what it was originally required to do and for the plaintiff to facilitate that machination by allowing the sum of B\$729,000 to be paid to the second defendant personally which otherwise would have been paid to the first defendant. It was upon this fraud that the plaintiff sought redress against the second defendant. In my view this is a clear case of a plaintiff coming to court with unclean hands.
- B** The plaintiff had no qualms in agreeing to defraud the first defendant and the plaintiff even has the audacity to proffer the excuse of wanting the contract badly as justification for their agreement to the fraudulent scheme. In this regard, though it can be said that the other shareholder (other than the second defendant) would eventually be defrauded, it is more accurate to state that it was the first defendant who was defrauded of the money. The
- C** plaintiff is now asking the court for assistance in the form of Mareva injunction which necessity arose out of the very fraud which the plaintiff participated and revealed in and which resulted in the diversion of the money to the second defendant which otherwise should have gone to the first defendant and which money the plaintiff is now attempting to get their
- D** hands on. Injunction being an equitable relief, the plaintiff must come to court with clean hands; they did not do so. This principle was applied lately in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 (FC). This reason alone was sufficient for me to set aside the injunction on 12 January 1999.

E *Cause of action against the second defendant*

Another reason for discharging the injunction is that the plaintiff has no cause of action against the second defendant in so far as the claim of the plaintiff against the second defendant is based on fraud. The basis of the claim by the plaintiff against the second defendant is asserted in the statement of claim in these words:

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- 17 The plaintiffs aver that there is direct evidence and/or evidence to show or infer that the second defendant have fraudulently and/or illegally dissipated and/or siphoned out the assets of the first defendant for his personal use and as such the corporate veil of the first defendants should be lifted to impose personal liability on the second defendant for his fraudulent and or illegal acts:
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Particulars of fraud

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- (i) Originally the plaintiffs had submitted a tender for the said project in the sum of BND\$3,257,211. However, the second defendant acting as the dominant director of the first defendants suggested to, directed and/or instructed Mr Chieng Bong Ming, the managing director of the plaintiffs, that if the plaintiffs wanted the said contract, which could be guaranteed by the second defendant, the plaintiffs should re-submit their tender for the said project in the sum of BND\$3,986,211, the additional sums of BND729,000 would be quietly and/or secretly taken out by the second defendant for his personal use without the knowledge of the other former director, the
- I**
- late Mr Yeap Kuek Loy.
- (ii) Accordingly, Chieng Bong Ming acting for the plaintiffs did as directed and/or instructed by the second defendant and the said

contract was indeed awarded to the plaintiffs by the second defendant acting as principal alter ego having dominant and effective control of the first defendant.

- (iii) The additional BND\$729,000 was paid out to the second defendant by Chieng Bong Ming; BND\$500,000 on or around the month of September, 1997 and BDN\$229,000 on or around the month of November, 1997.

Quite clearly the fraud alleged to have been committed by the second defendant is against the first defendant by causing the first defendant to lose B\$729,000,000 which eventually ended up in the pocket of the second defendant. That being the case, it can only confer a right of action to the first defendant to sue for the return of the said sum. Of course, the plaintiff has a right of tracing the money that went to the second defendant if the plaintiff can succeed in its claim against the first defendant but that is a matter of execution which no doubt the court in Negara Brunei Darussalam can assist. Therefore, in so far as the action against the second defendant is based on fraud, it must fail.

However, Mr William Chang Kok Liam, learned counsel for the plaintiff, had submitted that because the second defendant had committed fraud on the first defendant and because the second defendant was a dominant director of the first defendant and had full and effective control over the first defendant's affairs and management, 'the corporate veil of the first defendant should be lifted to impose personal liability on the second defendant and also to trace the assets of the first defendant.' Learned counsel then referred to, among others, the case of *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97. Mr David Lim Chin Chai, learned counsel for the defendants, while accepting the principle that the court can in an appropriate case lift the corporate veil, contended that this is not such a case because: (1) the second defendant does not own more than 50% of the shares; and (2) the second defendant was a passive participant in the dispute between the plaintiff and the first defendant which contention only goes to contest the strength of the plaintiff's case against the second defendant but can hardly, in my view, be a ground for striking out the claim of the plaintiff against the second defendant.

Jurisdiction

In so far as the claim against the first defendant is concerned, the plaintiff argued that this court has the jurisdiction notwithstanding that the plaintiff and the first defendant are foreign incorporated companies and the contract between them was entered into and performed in Negara Brunei Darussalam because the first defendant is one of two defendants, the other being the second defendant and that therefore the position is governed by s 23(1) of the Courts of Judicature Act 1964 which says that our courts shall have jurisdiction over a foreigner if the foreigner is sued with another defendant who resides or has his place of business within the local jurisdiction of our courts. As for that proposition of law it has been made clear by the case of *Malayan Banking Bhd v International Tin Council and*

- A *another appeal* [1989] 3 MLJ 286 and I am in agreement with learned counsel for the plaintiff that it applies equally well to the present case. This means this court has the jurisdiction notwithstanding that the contract was made and performed in Negara Brunei Darussalam. This leads me to consider the contention of the defendants that the court should stay the action because the action would be more conveniently tried in Negara Brunei Darussalam, relying on the doctrine of forum non conveniens.

Forum non conveniens

- C The Supreme Court in *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 approves of the fundamental principle of the doctrine of forum non conveniens being stated as being 'that there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice.' In this regard I am in agreement with defendants' learned counsel that Negara Brunei Darussalam is a more suitable and appropriate forum for the reasons that the contract sued upon by the plaintiff was entered into by parties who are residents of Negara Brunei Darussalam and the contract was performed in Negara Brunei Darussalam. The dispute also arose there with the result that witnesses like the architects and consultants being from that country, therefore the court there will be more suitable and appropriate.
- E The only factor, from the plaintiff's perspective, which favours the action being tried in Sarawak is the fact that the second defendant has assets in Sarawak which may be seized to satisfy any judgment that may be obtained whereas none is available in Negara Brunei Darussalam. But execution of any judgment obtained in Negara Brunei Darussalam (notwithstanding that Negara Brunei Darussalam is not a country listed in the First Schedule of the Reciprocal Enforcement of Judgments Act 1958) is no less achievable by an action in the High Court in Sabah and Sarawak on the judgment.

Conclusion

- G In the premises the defendants' application for the action to be stayed is granted with costs to the defendants.

Application allowed.

Reported by Zahid Taib

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